

## Farewell Speech of Yuejiao Zhang

Mr. Carim, Chairman of the DSB,,

Members of the WTO,

Dear Colleagues of the Appellate Body and its Secretariat,

Dear friends,

Ladies and Gentlemen:

Time flies very fast. I have completed eight years of service as a member of the world-renowned Appellate Body which is the highest adjudicative body of the WTO. These past eight years have been the most rewarding of my fifty years of professional life. Serving on the Appellate Body has been a deep honor. I would like to thank all those who made it possible for me to be part of this unique institution.

It has also been a privilege and true pleasure to have spent these eight years in the company of such intelligent, wise and collegial members of the Appellate Body, both present and past, as well as the very dedicated staff of the AB Secretariat. While I say farewell, I express my gratitude to each of you.

When I was appointed Appellate Body Member, I considered it to be a glorious mission and heavy responsibility on my shoulders. I took an oath before all of you on 23 May 2008 and I committed myself to serve the rules-based multilateral trading system and to settle trade disputes according to WTO law independently, impartially, conscientiously, and to avoid any conflicts of interest in the exercise of my functions and responsibilities. Independence and impartiality are of utmost importance for adjudicators. That we are unaffiliated with any Government and engage in no *ex parte* communication is a mandatory requirement for all panelists and AB members. This protects not only the authority and dignity of the AB, but also the integrity and credibility

of adjudicators. Like my AB colleagues, I pledged my dedication and priority in carrying out the work of the AB and ensuring the security and predictability of the multilateral trading system. This was not mere lip-service, but a fulfilled promise on my part. I never forewent an AB assignment for a personal matter. In October 2008, my father was hospitalized just before I was due to travel to Geneva for an appeal and I was reluctant to leave him. My father told me, "You should go to Geneva. Settling a world dispute of such dimension is more important than my health. I will recover." At his insistence, I came to Geneva as scheduled. After the oral hearing, the Exchange of Views among seven AB members and the Division's deliberation in the appeal process, I returned straight to the Beijing Hospital, but my father had passed away. My husband told me that my father had said that he was proud of me. These were his last words.

I have been inspired not only by my father, but also by the founding fathers of the Appellate Body. I count among these Ambassador Julio Lacarte, Judge Florentino Feliciano, as well as Professor John Jackson all of whom passed away in the last year. I was very fortunate to have had meetings with them in Geneva, in Beijing and other cities, where they shared with me their vast experience of WTO law and practice. Their vision, professionalism and dedication left a lasting impression on me.

I sincerely thank six AB colleagues for their dedication, profound knowledge on WTO law, collegiality, wisdom and long term experience on multilateral trade negotiations and dispute settlement, and for always making our deliberations warm, sharp, smooth and fruitful.

As AB members, we work hard. Despite extensive long distance traveling, many of us start to informally comment on issues through email at about 4 o'clock in the morning followed by intense meetings through the entire working day and into the evening and weekends. Since it is difficult to be recovered totally from the jetlag, almost all AB members have changed their regular sleeping time and become early birds!

In my view, the part time status of the AB members and 90 days time pressure for completion of AB report is not sustainable, particularly in times of heavy work load, and given the complexity of legal issues raised in appeals. Due to delays in the appointment process, the AB had only 6 members for 9.5 months in 2013. At present it has only 5 members. The current two vacant ABM positions should be filled as soon as possible.

I would also thank the AB Secretariat very capable lawyers and dedicated staff. They also work hard, including in the evening and on weekends, and often at the expense of personal and family commitments.

The shortage of capable lawyers is a big challenge for the WTO dispute settlement mechanism. Stable and well trained and capable lawyers are very important for the smooth appeal process and retaining institutional memory. Unfortunately I have seen 7 lawyers leave the ABS during the last 8 years, roughly 40 % of them to law firms. There is an urgent need for the WTO to recruit very qualified lawyers and to retain them.

My colleagues of the AB and ABS have treated me as family. During the last eight years, I spent four Chinese Spring Festivals at AB work in Geneva. Surprising me, my ABM colleagues and the AB Secretariat staff organized parties to celebrate my birthday. I was deeply moved to tears by the songs that they composed and the dancing for my farewell. I will never forget the warm hospitality and close friendship that they offered me.

I am also grateful to the Chinese Government who nominated me to the AB after I had retired from the Asian Development Bank. The Chinese Government has never intervened in my work in the AB, even when I, together with other Members of the Division, ruled that their measures failed to comply with some of the covered agreements. I am very impressed by their implementation of the WTO rulings.

My gratitude also goes to other Members of the WTO. They have respected the AB's findings even when such rulings found fault with their measures. The mandatory nature and good enforcement of DSB-adopted rulings is key to the success of the WTO dispute settlement system. At the same time, the trust and confidence that WTO Members place on the adjudicators encourage the AB to make every effort to ensure prompt and positive solution of trade disputes..

It is usually imprudent for adjudicators to speak on the issues they are asked to decide. Therefore, I was almost faceless and voiceless during my eight-year tenure at the WTO Appellate Body.

There are, however, a few occasions where AB Members have been able to be more open, and frank, in expressing personal views. Following AB tradition, I would like to take this Farewell as an opportunity to offer a few modest personal observations about the WTO Dispute Settlement System and the Appellate Body.

The WTO Dispute Settlement System is highly regarded, and often referred to as "the jewel in the crown" of the WTO. Its establishment, including the creation of a permanent Appellate Body, was a significant achievement. The fact that some regional or bilateral trade and investment agreements will introduce a similar permanent court shows what a model the WTO Appellate Body has become for trade and investment dispute settlement.

WTO law is part of public international law. Trade is the engine of world economic development. More than 98% world trade is subject to WTO law, which provides security and predictability to the multilateral trading system. Consequently the harmonized and binding WTO law has contributed to the harmonization of public international law and to reducing its fragmentation. I believe that WTO law has also contributed to global economic governance, enhancing such important principles as the rule of law, accountability, transparency and inclusiveness.

During the last eight years I saw how much WTO law and dispute settlement contributes to the prevention of trade friction and reduction of trade protectionism under the world financial crisis and economic downturn. At the same time, I saw that 13 new Members joined WTO, committing themselves to rules-based multilateralism. The WTO has really become a “world” organization.

Meanwhile, I saw the extreme difficulty that WTO Members have in reaching consensus on important issues through multilateral trade negotiations. The slow process of the decision making in the WTO needs reform.

Overall, I believe that with its solid legal foundation, successful dispute settlement system as well as its sound negotiation and trade policy review mechanism and effective technical cooperation, the WTO plainly has the vigour not only to survive during difficult times, but to contribute to the peace and development of the world. The WTO will never die!

In recent years, the WTO Dispute Settlement System has faced many challenges. For instance, the demand for dispute settlement among Members is high, the number of cases being brought to the WTO is increasing, more issues and more complex issues are being raised, and submissions and reports are getting longer. All of this has created a heavier workload and engendered a shortage of experienced professional staff, but the budget is tight. How is the WTO to deal with these challenges?

I would like to offer some very preliminary and personal thoughts and proposals:

First, the WTO should explore the possibility of more use of the informal resolution of governmental trade disputes, for example, through consultation, mediation, and conciliation (also called alternative dispute resolution ADR). This would be an ideal choice. As ADR proceedings are faster than formal adjudication proceedings, the cost is lower to the parties; the proceedings are

less formalistic, less legalistic, and less burdensome to the parties. Furthermore, ADR can reduce confrontation between parties and maintain long-term trading relationships among WTO Members. Parties' autonomy is the underlying principle. If the parties are willing to settle their trade disputes voluntarily and peacefully without prejudice to the interests and rights of a third party, they should be encouraged to do so. The DSU should provide incentives to let Members settle their disputes through ADR. Some Members may be concerned about the enforceability of the outcome of ADR. Just as the DSB adopts panel and AB reports having legal effect, it too could adopt any ADR agreement among parties.

Second, if consultations fail, the next step in WTO dispute settlement proceedings is the panel stage, which is very important. Fact-finding and legal reasoning, as well as the quality of panel reports, are vital parts of this stage of the process. Panelists act on an ad hoc basis. Selection and training of panelists is extremely important. To ensure a fair representation and participation of WTO membership in this process, selection and training of panelists from developing country Members should be a top priority in the legal aid agenda of the WTO.

Third, measures are needed to address the current shortage of qualified lawyers to support panel and appeal work. Internal mobility of qualified lawyers should be encouraged, and ongoing training in fact-finding and legal reasoning should be encouraged and made more available to Secretariat staff in the dispute settlement Divisions. Drafting consonant with WTO law, coherent, convincing, concise and reader-friendly reports should be a key objective of in-house quality control.

Fourth, the competent authorities and Committees of the WTO should clarify and interpret the WTO covered agreements in a timely manner. Through subsequent agreements, a set of secondary rules can be adopted quickly.

As the highest decision making body of WTO, the Ministerial Conference decisions should be given more weight. All Members should implement adopted Ministerial decisions in good faith.

Fifth, on the subject of remand, I would think the introduction of such a new system may not be effective, because once the parties know the outcome of the AB's decision, they may be reluctant to provide additional factual information that would confirm their violation of the covered agreements. In addition, organizing new panels is very time-consuming, and may prolong the proceedings and impose more burdens on the parties. If a panel undertakes a thorough fact-finding exercise and parties cooperate in providing all uncontested evidence and sign an agreed statement of facts, there should be little need for panels to exercise judicial economy. Then, at the appellate review stage, if the AB reverses some of the panels' interpretations and conclusions, the AB can complete the legal analysis based on the uncontested facts and other factual information and findings in the panel report. By completing the legal analysis, it can avoid mooting some of the panel decisions and not leave issues open.

Sixth, many panel meetings and oral hearings are now open to public viewing. Some Members are reluctant to open the oral hearing to the public because they have few representatives in Geneva who can benefit from the hearing. Providing access through internet streaming would allow more Members and more people to benefit from such open proceedings. Making the WTO DS proceedings more transparent is beneficial to the dissemination of WTO law and training of people. Article 17 of the DSU should be amended accordingly.

Seventh, a further improvement to WTO dispute settlement proceedings would be the issuance of more concise and convincing reports. Written submissions by the parties should be shorter with set page limits. The determinations of a reasonable period of time awarded through arbitration should be no more than 15 months, and there is no need for reports setting

out such determinations to be lengthy. Article 21.5 compliance proceedings should focus on the measures taken to comply, and should not reopen the case.

Eighth, the DSU stipulates that the AB shall provide its report within a maximum of 90 days. But the 90 days include weekends, holiday periods, and time needed to translate the report into the official WTO languages. So the actual working days are really only two months. This tight time requirement should be more flexible, based on the complexity and novelty of the legal issues in question. Quality and outcome should be the first consideration of dispute settlement proceedings. In my view, AB reports could be shorter and more concise if the AB was afforded the time necessary for deliberation and drafting of its reports.

Ninth, to achieve the UN millennium goal on poverty reduction and enhancing the standard of living of people in the world, trade policies play a very important role. Several WTO covered agreements also ensure governments' rights to regulate according to law. Among those policies to protect public goods, I see environmental protection and appropriate subsidies.

For instance, should Article 8 of SCM agreement on Non Actionable Subsidies be reactivated? I believe that assistance to research activities, assistance to disadvantaged regions; assistance to promote adaptation of existing facilities to new environmental requirements imposed by law should be non actionable.

Tenth, while the multilateral trade negotiation is slow, the regional free trade agreement negotiations develop rapidly. There are more than 400 Regional Free Trade Agreements. Should the WTO do more than merely receive the reports and information of the FTAs? Perhaps it could coordinate or provide best practices or samples to its Members to enhance the weaker Members' bargaining position and help to avoid conflicts between FTAs and the covered agreements. There are new modalities to conduct cross border trade, such as import and export over the internet. Should the WTO take the lead in the preparation of relevant rules to govern new ways of trading?

For all the above tasks, we need highly qualified people, trade specialists, economists and WTO lawyers. Human resources development is the key, particularly the training of developing countries' experts on WTO.

In concluding my personal reflexions, I am very confident that WTO dispute settlement is sound and widely supported by 164 Members. More importantly, WTO dispute settlement is handled by very capable, highly professional and very knowledgeable AB Members, panelists, Secretariat staff and WTO Members. I thank you again from the bottom of my heart for your very hard work and effective contribution to the success of the WTO dispute settlement system. I am proud to have been a part of it. I wish you all the very best!